

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7541

United States Court of Appeals FOR THE SECOND CIRCUIT

DANIEL E. RYAN, Admr. of the Estate of Marvin George Ellsworth Mousseau,
Plaintiff,

vs.

NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC.,
VERMONT CONSTRUCTION COMPANY, INC., and
GEORGE & ASMUSSEN, LTD.,

Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,

vs.

Plaintiff-Appellant,

JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,

Defendant.

Civil Action No. 73-240.

ALVIN E. MARTIN,

vs.

Plaintiff,

NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC.,
VERMONT CONSTRUCTION COMPANY, INC., and
GEORGE & ASMUSSEN, LTD.,

Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,

vs.

Plaintiff-Appellant,

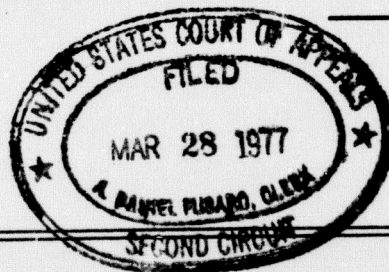
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,

Defendant.

Civil Action No. 74-99.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT
IN CIVIL ACTIONS NO. 73-240 AND 74-99.

BRIEF FOR THIRD-PARTY DEFENDANT / APPELLEE JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.



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ARGUMENT

- I. THE THIRD-PARTY COMPLAINT WAS PROPERLY DISMISSED, SINCE VERMONT CONSTRUCTION IS ENTITLED NEITHER TO CONTRIBUTION NOR INDEMNITY.

By its third-party complaint, the general contractor Vermont Construction Company, Inc. ("Vermont Construction") seeks indemnification from the subcontractor, Johnson Industrial Painting Contractors, Inc. ("Johnson") for liability imposed upon Vermont Construction arising from personal injuries sustained by Johnson's workers. When viewed in light of Vermont law,* Vermont Construction's third-party claim is insufficient as a matter of law, and, therefore, was properly dismissed by the Court below.

Under Vermont law, Vermont Construction is not entitled to contribution or indemnity. It is well established that Vermont law generally denies contribution and indemnity between wrongdoers. Spafford v. Howard, 132 Vt. 434 (1974); Spaulding v. Oakes, 42 Vt. 343, 347 (1869). While Vermont law has never recognized a joint tortfeasor's right to contribution, exceptions to the general rule have been made to permit indemnification between wrongdoers under two circumstances. First, indemnification is permitted where there is an express agreement between the parties to indemnify. Second, indemnification is permitted when the relationship between the parties is such that the law

* There is no dispute between the parties that the substantive law of the State of Vermont is the appropriate choice of law.

recognizes an implied obligation of one party to indemnify the other. Viens v. Anthony Company, 282 F. Supp. 983, 985-86 (D. Vt. 1968).

Since Vermont Construction's claim does not fall within the recognized exceptions to the rule of law which denies contribution and indemnity between wrongdoers, the third-party complaint was properly dismissed.

In the case at bar, Johnson did not expressly agree to indemnify Vermont Construction for personal injury damages. Vermont Construction argues that Article XI of the contract (hereinafter referred to as the "Painting Subcontract") between it and Johnson is broad enough to be interpreted as an express indemnity clause requiring indemnification of any damages paid to Johnson's workmen for personal injuries resulting from the manner in which the work was done. In support of its position, Vermont Construction notes that Article XI provides in part:

The subcontractor undertakes expressly to pay all the damages that could be caused to the contractor as a result of defects in his work or as a result of his defaults to terminate according to the schedule...

Appellant's Brief at 17.

As the Court below correctly ruled,* Johnson agreed by the above-quoted portion of Article XI to indemnify Vermont Construction only for defects in workmanship or for its failure to complete the job on schedule. The terms of the Painting Subcontract and the general conditions of the contract (hereinafter referred to as the "General Conditions") between Vermont

* See Appendix at 51 n. 1.

Construction and the hospital make it clear that Article XI of the Painting Subcontract was intended to obligate Johnson to indemnify Vermont Construction only for defective workmanship or tardy performance (and not for personal injury damages resulting from the manner by which the work was performed). In addition to the language which Vermont Construction quotes in its brief, Article XI of the Painting Subcontract provides:

More especially the subcontractor will be responsible for any amount that contractor might be obliged to pay to the owner as a penalty for delay or for defects and also for the interest on the sums which would be withheld [sic] by the owner as a result of said delay or defects.

Appendix at 320. Significantly, the potential liability to which reference is made in Article XI of the Painting Subcontract is clearly described in the General Conditions:

Except as otherwise specified all work shall be guaranteed by the contractor [Vermont Construction] against defects resulting from the use of inferior materials, equipment, or workmanship for one year from the date of final completion of the contract....

General Conditions, paragraph 52, Appendix at 330. Taken together* these two provisions reveal that the intent of the parties was to provide for indemnification of Vermont Construction from liability for certain work product defects. There is no indication that the parties intended a sweeping indemnification provision extending to personal injuries arising from the manner in which the work was done.

* It is appropriate to refer to the General Conditions in interpreting the Painting Subcontract. See Article I, Painting Subcontract, Appendix at 319.

The issue of worker injuries was dealt with in Article VII of the Painting Subcontract. Significantly, that article does not suggest that Johnson has any obligation to indemnify Vermont Construction for worker injuries. Rather Johnson was required to maintain certain Workmen's Compensation and other insurance coverage, which it did.

Vermont Construction urges that Johnson's simple guarantee of the quality of its work product and the timeliness of the project completion should be transformed into an all-encompassing agreement to indemnify Vermont Construction for personal injury arising from the manner by which the work was performed. Such an interpretation goes beyond the plain language of the agreement and the apparent intention of the parties.

Neither should it be implied that Johnson has an obligation to indemnify Vermont Construction for the workers' personal injuries. As noted by the late Judge Leddy, Vermont law implies an indemnity agreement only when a party incurs liability without active fault on his own part. Viens v. Anthony Company 282 F. Supp. 983, 987 (D. Vt. 1968). See also Spaulding v. Oakes, 42 Vt. 343, 347 (1869). In the case at bar, the trial court found that Vermont Construction was actively negligent:

The evidence at the trial firmly establishes that the general contractor, Vermont Construction, and the subcontractor, Johnson, were both at fault in the tragic accident that occurred on the construction site. Both actors were actively negligent in their failure to exercise reasonable care for the safety of Mousseau and Martin. In the court's judgment, they stand as joint tortfeasors.

Memorandum and Order, Appendix at 65-66.

The evidence introduced below supports the trial court's finding that Vermont Construction was independently negligent. Under the General Conditions, Vermont Construction owed several independent duties. It was obligated to supervise the work:

The contractor [Vermont Construction] shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the architect, on the work at all times during progress, with authority to act for him.

General Conditions, paragraph 49, Appendix at 330. In addition, Vermont Construction was obligated to use qualified persons [paragraph 36, Appendix at 328], to take every precaution against injuries to persons [paragraph 26(a), Appendix at 326] and to exercise precaution at all times for the protection of persons (including employees) [paragraph 20, Appendix at 326].

Contrary to the suggestion of Vermont Construction's Brief, Vermont Construction and Johnson did not agree that Johnson would assume all responsibility for Vermont Construction's obligations.*

* Appellant's brief twice erroneously states that Johnson agreed to assume this responsibility. At page 18 Vermont Construction states:

Assuming Vermont Construction had a duty with regard to conditions of the premises, it made a contract with Johnson to perform this duty....

Again, on page 20 of its brief Vermont Construction erroneously states:

Assuming that both Vermont Construction and Johnson owed duties to the plaintiff, they did not violate the equivalent duties, but successive duties. The parties were not in equal fault because Vermont Construction was entitled to rely on its contract with Johnson....

Appellant's Brief at 20.

As Article V of the Painting Subcontract indicates, both Vermont Construction and Johnson agreed to be jointly bound to the duties imposed by the General Conditions. That article provides, in pertinent part:

[T]he general conditions of the contract made between the contractor and the owner will bind and oblige both the contractor and the subcontractor inasmuch as they are applicable to the present contract.

Painting Subcontract, Article V, Appendix at 319. As this provision indicates, the independent duties owed by Vermont Construction were not delegated to Johnson,* and, therefore, the court below quite properly determined that Vermont Construction breached its duties and stands as an independent, active tortfeasor.**

Since the record below clearly reveals that Johnson did not expressly agree to indemnify Vermont Construction for liability arising from worker injuries, and since Vermont Construction was properly found to be independently and actively negligent, no indemnity obligation arises. Therefore, no error can be claimed from the dismissal of the third-party indemnity claim.

* It is not surprising that Vermont Construction did not attempt to delegate its duties to Johnson, since the General Conditions prevent Vermont Construction from relieving itself from liability by delegating its duties to subcontractors. See General Conditions, paragraph 21(b), Appendix at 326.

** It appears that Vermont Construction admits its own negligence. See Appellant's Brief at 29, 33.

II. VERMONT CONSTRUCTION'S MOTION TO REDUCE THE JUDGMENT WAS PROPERLY DENIED.

At the conclusion of the trial, contractor Vermont Construction moved to reduce the judgment rendered against it by the amount of Workmen's Compensation received by the plaintiffs. Appendix at 60. It is not clear whether Vermont Construction merely seeks to reduce the judgment, or whether it also seeks a determination that the reduced judgment should be paid directly to the workers without reimbursing Johnson or its Workmen's Compensation carrier.*

Either way, the motion was properly denied, since it is predicated on the argument that Johnson was also negligent, and calls for a determination of Johnson's rights. No judicial determination of Johnson's alleged negligence which is binding upon Johnson has been made. Having dismissed Johnson, the court below lacked jurisdiction over Johnson to adjudicate its alleged liability and to render a judgment affecting its rights.

* Vermont Construction's motion to reduce the amount of the judgment ostensibly seeks to do no more than just that. Appendix at 60-61. If the judgment is simply reduced, Vermont law would seem to require that the reduced judgment be used to reimburse Johnson or its Workmen's Compensation carrier, after payment of the workers' expenses of this litigation. 21 V.S.A. §624 (1967). However, Vermont Construction suggests in its Brief that it seeks to reduce the judgment amount by the amount of Workmen's Compensation [Appellant's Brief at 29] and also seeks to pay the reduced judgment directly to the workers, free of any obligation to reimburse Johnson or its Workmen's Compensation carrier. See Appellant's Brief at 30.

Contrary to the suggestion of the Appellant's Brief,* Johnson has not claimed that it is entitled to reimbursement. To be certain, such a claim will be made in the future if any judgment against Vermont Construction in excess of the worker's litigation costs is upheld. However, since the dismissal of third party action, Johnson has made no appearance below, and has not sought any relief from the trial court.

If Vermont Construction seeks to avoid reimbursing Johnson** (or Johnson's Workmen's Compensation carrier) it might do so in subsequent proceedings between Vermont Construction and Johnson concerning Johnson's right to reimbursement. However, the court below, no longer having jurisdiction over Johnson, is unable to bind Johnson to an adjudication of negligence and is unable to affect Johnson's rights. Therefore, it quite properly denied the motion.

* Appellant's Brief at 29.

** Johnson does not concede that Vermont Construction is entitled to avoid such reimbursement. Neither the text of the pertinent statute [21 V.S.A. §624 (1967)] nor recent expressions of the Vermont Supreme Court suggest that Vermont Construction has any basis to avoid the statutory reimbursement. See Dubie v. Cass-Warner Corp., 125 Vt. 476, 478 (1966) (Holden, C.J.); Spafford v. Howard, 132 Vt. 434 (1974). While the Vermont Supreme Court has not directly addressed this precise issue, Judge Holden's ruling below anticipates that the Vermont Supreme Court would enforce reimbursement under these circumstances. Appendix at 66. Deference should be accorded Judge Holden in determining questions of Vermont law. Smith v. Vermont Young Women's Christian Ass'n., Inc., 514 F. 2d 21, 22 n.2 (2d Cir. 1975).

CONCLUSION

Vermont Construction has no claim against Johnson, since Vermont law does not recognize contribution between joint tortfeasors, and since no indemnification agreement may be found or implied. There is no express indemnification agreement which covers personal injuries to Johnson's workers. There is no basis for implying an indemnity agreement, since the record reveals that Vermont Construction was independently and actively negligent. For these reasons the trial court correctly dismissed the third-party complaint. The dismissal should be upheld.

Vermont Construction's motion to reduce the judgment amount was properly denied. The motion is dependent upon a finding that Johnson is negligent, and should not, therefore, receive reimbursement. No judicial determination binding upon Johnson has been made as to its alleged negligence, because the court below relinquished adjudicatory authority over Johnson when it dismissed the third-party complaint. Without jurisdiction over Johnson, the court below is unable to render a judgment affecting Johnson's right to reimbursement. For these reasons the motion to reduce the judgment amount was properly denied, and the decision of the court below should be upheld.

Respectfully submitted this 25th day of March, 1977.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 76-7541

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Marvin George Ellsworth Mousseau,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 1977, I served two copies of the Brief of Third Party Defendant/Appellee, Johnson Industrial Painting Contractors to which this certificate is attached, upon Tyler & Bruce, Esqs.; Dinse, Allen & Erdmann, Esqs.; Miller & Norton, Esqs.; Pierson, Affolter & Wadhams, Esqs.; and Hoff, Wilson & Jenkins, Esqs., by first class mail, with proper postage affixed in a properly addressed envelope, to the last known address of each of the above.

St. Johnsbury, Vermont. 25 March 1977

DOWNS, RACHLIN & MARTIN

By: 

Gary H. Barnes